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1977

# Western Gateway Storage Co. v. Fred G. Treseder And Antonia Treseder, Hls Wlfe, and the United States of America : Brief of Defendant-Appellant

Utah Supreme Court

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W. Brent West & Darrell G. Renstrom; Attorneys for Defendant-Appellants RICHARD W. CAMPBELL; Attorney for Plaintiff--Respondent

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH  
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WESTERN GATEWAY STORAGE CO., )  
Plaintiff--Respondent, \* Case No.  
vs. ( \* 14816  
FRED G. TRESEDER and ANTONIA )  
TRESEDER, his wife, and THE UNITED \*  
STATES OF AMERICA, ( \*  
Defendants--Appellants.\*

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BREIF OF DEFENDANT--APPELLANT  
-----

Appeal from the verdict of a District Court sitting without a jury in and for the  
Second Judicial District of Weber County, State of Utah, the Honorable John F.  
Wahlquist presiding.

-----  
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MAR 18 1977

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Clerk, Supreme Court, Utah

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

WESTERN GATEWAY STORAGE	)	
CO.,	*	
Plaintiff--Respondent,	(	Case No.
vs.	*	
	)	
FRED G. TRESEDER & ANTONIA	*	14816
TRESEDER, his wife, and THE	(	
UNITED STATES OF AMERICA,	*	
Defendants--Appellants. )		

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BRIEF OF APPELLANTS

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STATEMENT OF THE NATURE OF THE CASE

This is an action to declare abandoned a right of way to real property.

DISPOSITION IN LOWER COURT

The case was tried to the court. Appellants appeal from a verdict and Judgment in favor of the respondent vacating and declaring abandoned a portion of their right of way.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the Judgment and Judgment in their favor as a matter of law, or failing that, a new trial.

STATEMENT OF THE FACTS

The respondent, Western Gateway Storage Co., a Utah Corporation, is the owner in fee simple of the following described property:

An irregular tract of land being all that part of said Lot 1, Block 1, Ogden Five Acre Plat "A" of Ogden City Survey, in the City of Ogden, Weber County, Utah, bounded and described as follows:

Beginning at a point 119.78 feet N.  $89^{\circ} 02'$  W. of the southwest corner of Wall Avenue and Doxey Street;

thence S.  $0^{\circ} 58'$  W. a distance of 129.0 feet thence N.  $89^{\circ} 02'$  W. a distance of 219.43 feet;

thence N.  $4^{\circ} 34' 30''$  W. a distance of 129.61 feet, more or less, to a point in the north boundary line of that certain parcel of land which was heretofore conveyed by Amy Knight to The Ogden Union Railway and Depot Company by Quit-claim Deed dated November 16, 1929;

thence S.  $89^{\circ} 02'$  E. along the north boundary line of said parcel heretofore conveyed by said deed dated November 16, 1929 and along the extension of said north boundary line a distance of 146.10 feet, more or less, to the northeast corner of that certain parcel of land which was heretofore conveyed by General Finance Company to The Ogden Union Railway and Depot Company by Warranty Deed dated December 9, 1929;

thence S.  $0^{\circ} 58'$  W. along the east boundary line of said parcel heretofore conveyed by said deed dated December 9, 1929 a distance of 120.0 feet to the southeast corner of said parcel;

thence S.  $89^{\circ} 02'$  E. along the northerly boundary line of that certain strip or parcel of land upon which a right of way was granted by General Finance Company to the Ogden Union Railway and Depot Company by said deed dated December 9, 1929, a distance of 40.7 feet, more or less, to a corner;

thence N.  $80^{\circ} 08'$  E. along said northerly boundary line a distance of 28.7 feet to a corner;

thence N.  $18^{\circ} 03'$  E. along the northwesterly boundary line of said strip upon which right of way was granted by said deed dated December 9, 1929, a distance of 19.65 feet to a corner;

thence N.  $0^{\circ} 37'$  E. along the westerly boundary line of said strip upon which right of way was granted by said deed dated December 9, 1929, a distance of 95.3 feet, more or less, to

a point which bears N.  $89^{\circ}02'$  W. from the point of beginning;  
thence S.  $89^{\circ}02'$  E. a distance of 11.85 feet to the point of beginning.

(FF #1)

The appellants, Fred G. Treseder and his wife, Antonia Treseder, are the owners of the following described real property and right of way:

A part of Lot 1, Block 1, Ogden Five Acre Plat "A" of Ogden Survey: Beginning at a point 165.63 feet North  $89^{\circ}02'$  West of the Southwest corner of Wall Avenue and Doxey Street and running thence South  $0^{\circ}58'$  West 120 feet; thence North  $89^{\circ}02'$  West 40 feet; thence North  $0^{\circ}58'$  East 120 feet; thence South  $89^{\circ}02'$  East 40 feet to the point of beginning.

ALSO, a right of way over the following described part of said Lot 1: Beginning at a point 119.78 feet North  $89^{\circ}02'$  West of the Southwest corner of Wall Avenue and Doxey Street and running thence South  $0^{\circ}58'$  West 129 feet; thence North  $89^{\circ}02'$  West 245.4 feet; thence North  $0^{\circ}31'$  East 129 feet; thence South  $89^{\circ}02'$  East 9 feet; thence South  $0^{\circ}25'$  West 104.6 feet; thence South  $20^{\circ}04'$  East 8.3 feet; thence South  $65^{\circ}08'$  East 20.2 feet; thence South  $89^{\circ}02'$  East 168.72 feet; thence North  $80^{\circ}08'$  East 28.7 feet; thence North  $18^{\circ}03'$  East 19.65 feet; thence North  $0^{\circ}37'$  East 98.2 feet; thence South  $89^{\circ}02'$  East 11.85 feet to the point of beginning.

The right of way referred to above has come to the appellants through a series of deeds recorded in the office of the Weber County Recorder.  
(FF #2)

The appellant, United States of America, has an interest in the right of way, as described above, by reason of a mortgage which is also duly recorded in the office of the Weber County Recorder. The interest of the appellant, United States of America, is no greater than that of the appellants Treseder, and thus the decision of this court would be binding on both appellants. (FF #19)

The easement in question starts on Doxey Street in Ogden City, Utah and goes to the south one (1) short city lot, then turns at substantially a right angle, goes west for six (6) narrow city lots, makes an approximate right turn and proceeds back to Doxey Street. The easement is approximately nine(9) feet wide with a slight increase at each of its internal corners. It has never been improved or paved. (FF #3) The easement is roughly "U"

shaped and encompasses six (6) city lots. Each one of the six (6) lots is approximately fifty (50) feet wide. Each of the houses takes substantially all the frontage so that there is less than six (6) feet of side frontage for each lot. Passage by vehicular traffic to the back of each house is impossible. The only access is via the easement. (FF #4)

Physically, the easement contains several objects which make access somewhat more inconvenient but no where near impossible. The evidence indicates the presence of shrubbery, chinese elm trees, debris mounds of dirt, a utility pole, and at one time an abandoned car. (FF #5) The Treseder home also has a wooden fence running along the easement in the backyard. The fence has no gate, but does have a removable section allowing access. (FF #10)

The respondent, Western Gateway Storage, has within the past year acquired title to the land that comprises the right of way, together with the property comprising the four (4) westerly lots of the land enclosed within the confines of the easement. Respondent intends to build a large refrigerator storage building on its property. To do so, according to already drawn plans, would result in closure of a portion of the easement west of the appellants' property. (FF #7)

The lot furthestmost to the east still has a home on it, but it has been unoccupied for over a year. This is the home of the Defendant, Al Newcomb. However, the Defendant Newcomb, having defaulted in this case, is not a party to this appeal. (FF #8)

The lot situated east of the respondent's property and west of the Newcomb property is that of the appellants, Treseder. It is a short lot, approximately fifty (50) feet wide. (FF #9) The Treseder family has owned this property since 1909. (CT 120 lines 19-27) The appellant, Fred Treseder, purchased it from his family in 1964. (CT 118 line 3-4) The appellants lived in the home until 1972 and have been renting it out since then. (CT 118 lines 20-26)

Prior to 1956, the most frequent use of the easement was for the delivery of coal. At that time, coal was the principal fuel used in that area. However, with the conversion of the area to natural gas, the delivery of coal ceased. (FF #6) During the appellants' tenure of ownership, the property has been used on the average of four (4) times a year over the past ten (10) years. (CT 121 lines 24-30 and CT 122 line 1-2) The most recent use of the right of way by the appellants was in the fall of 1975 when one of the appellants' tenants moved out and the appellants had to make two or three trips back and forth to remove debris that had accumulated. (CT 124 lines 1-9) The record further reflects that in 1973 appellants also used the right of way to deliver and later remove supplies used to remodel the house. (FF #10)



move furniture into the house. (CT 155 lines 24-30 and CT 156 lines 1-2)

On March 1, 1976 the respondent initiated this suit requesting that the court declare the appellants' easement abandoned and of no further force and effect. Trial was held on July 29, 1976 and Judgment was entered for the respondent. Finally, on September 20, 1976 appellants' Motion for a new trial was denied.

### ISSUE OF LAW

The District Court's Judgment was contrary to law in that the evidence failed to support a finding of intent to abandon by the appellants.

### ARGUMENT

There is little question that an easement or right of way may be abandoned by its owner. Dahnken vs. George Romney & Sons Co., 111 Utah 471, 184 P.2d 211 (1947). However, in examining whether or not an easement has in fact been abandoned there are several factors that should be considered. Included among these factors are whether or not the easement is a prescriptive easement or one that has been obtained through a series of deeds and conveyances. Also important, is the extent to which the easement has or has not been used. Still, a third factor to be considered is the actual intent of the owner to abandon his easement.

In the present case, the appellants' easement is one which has come to them through a series of conveyances. It is not a prescriptive easement. This is an important distinction since there is apparently some authority indicating that a prescriptive easement may be lost merely by non use. 3 Powell on Real Property Sec. 423 at 494 (1954) Easements which come to their owners by way of conveyance require some demonstration of not only use, but an actual intent to abandon. In an early case, the Utah Supreme Court held that the mere non use of an easement acquired by grant, however long continued, does not constitute an abandonment. Brown vs. Oregon Short Line R.R., 36 Utah 257, 102 P. 740 (1909) This position has been reaffirmed in several later decisions. Tuttle vs. Sowadski, 41 Utah 501, 126 P. 959 (1912) and Riter vs. Cayias, 19 Utah 2d 358, 431 P.2d 788 (1967) It also appears that a large number of western state courts have adopted the same position. Thompson vs. Smith, 59 Wash. 2d 397, 367 P.2d 798 (1962); City of Billings vs. O.E. Lee Co., \_\_\_\_\_ Mont. \_\_\_\_\_, 542 P.2d (1975); Westland Nursing Home Inc., vs. Benson, 33 Col. App. 245, 517 P.2d 862 (1974); and Sullivan Const. Co., vs. Twin Falls Amusement Co., 44 Idaho 520, 258 P. 529 (1927) In addressing this same point, the Ninth Circuit Court of Appeals in Griffeth vs. Utah Power and Light, 226 F.2d 661 (9th Cir. 1955) held that an easement may be lost by adverse possession or by abandonment, but mere non use does not constitute abandonment unless accompanied by intent to abandon.

Before applying this concept of an intent to abandon to the facts of this case it is important to note that the Idaho Supreme Court in O'Brien vs. Best, 68 Idaho 348, 194 P.2d 608 (1948) found that an abandonment of any right is dependent on an intention to abandon and must be evidenced by a clear, unequivocal, and decisive act of the parties, who allegedly abandoned the right. See also, Sullivan Const. Co. vs. Twin Falls Amusement Co., 77 Idaho 520, 258 P. 259 (1927); and Perry vs. Reynolds, 63 Idaho 457, 122 P.2d 508 (1942). Although, never alluding to Idaho opinions, this court in a more recent decision accepted that same standard of intent. The court in dealing with a prescriptive easement held that proof of abandonment of such easement requires action releasing the ownership and the right to use with clear and convincing proof of an intentional abandonment. (Emphasis added) Harmon vs. Rasmussen, 13 Utah 2d 422, 375 P.2d 762 (1962). Thus this court has established a standard for establishing an intent to abandon which requires more clear and persuasive evidence than that necessary in circumstances where only a preponderance is required.

In applying the requirement of intent to the facts of this case it becomes apparent that there was no demonstration of actual intent to abandon the right of way by the appellants. Both the appellant, Fred Treseder and his wife, Antonia, testified that they never had any intention of abandoning the right of way and neither had ever expressed, to any third person, their intention to abandon their easement. (CT 136, lines 17-30; CT 156, lines 25-30 and CT 157 lines 1-2) Their testimony was further supported by that of the appellant Treseder's father, Thomas Treseder, and by Roger Bryant, who at one time had been a tenant of the appellants. Both of these witnesses testified that neither the appellant, Fred Treseder, nor his wife, had ever expressed to them any intent to abandon their right of way. (CT 139, lines 22-30; CT 140, lines 1-25 and CT 145, lines 1-3) In fact, both witnesses testified as to several instances where they had actually observed the appellants use their right of way. (CT 132, lines 4-5; CT 142, lines 26-30; CT 143, lines 1-30 and CT 144, lines 1-10) Mrs. Eva Long, a resident of the neighborhood, also testified that she had observed the appellant, Fred Treseder, as well as tenants of the appellants, using the right of way or "alley" as she referred to it. (CT 148, lines 28-30; CT 149, lines 1-8 and CT 150, lines 12-14)

In support of its position, the respondent, Western Gateway Storage Co. seems to have relied primarily on the physical conditions of the easement, (FF #14) the substantial change in circumstances since the establishment of the right of way (FF #19) and the fact that the fence behind the appellants' home has no gate for easy access to and from the right of way (FF #10). While it is true that the evidence reflects that the right of way contains rubbish, Chinese elm trees, piles of dirt, a Utah Power and Light utility pole and at one time a used automobile, (FF #14) these obstacles do not reinforce the fact that the appellants never intended to abandon the right of way.

way. Despite these obstacles, the appellant Treseder continued to use the right of way. The evidence reflects that the right of way was used on several occasions; once when the house was remodeled to bring in supplies and once again to take them away. (FF #10) It was also used once to move a tenant in and once to haul away a large accumulation of trash after another tenant had moved out. (CT 155, lines 24-30 and CT 156, lines 1-12)

Even if one were to consider, in total, the physical condition of the right of way, the change of circumstances since the establishment of the easement, and the fact that the fence behind the appellants' home has no gate, these would only be indications of a somewhat less than regular use of the easement. While non use of an easement is evidence of an intention to abandon it, an easement once established is presumed to continue unless there is a manifest showing of intent to abandon it. Jenson vs. Brooks, \_\_\_\_\_ Nev. \_\_\_\_\_ 503 P.2d 1224 (1972) There was never established a manifest intent on behalf of the appellants to abandon their right of way. Neither were there sufficient unequivocal acts by the appellants sufficient to establish an inference of an intent to abandon. The appellants continued to use their right of way despite the obstacles which existed and despite the apparent abandonment of the easement by other persons.

One other point, relied upon by respondent at trial, should also be considered. Each interest in the right of way is separate and distinct. The fact that others have either abandoned their interest or defaulted in this lawsuit, (FF #8) should in no way reflect upon the appellants. The question of the appellants' intent should be examined solely from the actions and manifestations of the appellants and not implied from those of others. Thus the fact that the appellants are the only persons to object to the closing of the right of way is of little importance.

Finally, there is respondent's contention that by keeping the easement open it will result in serious financial loss to the respondent and that by closing the easement the appellants will suffer only a very slight inconvenience. Undoubtedly, the purchase price paid by the appellants reflected an increase in value because of the easement. Easements are generally considered property rights and are capable of having an economic value priced on them. Restatement of Property, Sec. 450 (1944) The closing of a portion of the appellants' right of way, without any manifest intent by them to abandon it would be tantamount to the taking of one's property without just compensation and the denial of due process.

"The essential element of actual abandonment is the intent to lease, quit, renounce, resign, surrender, relinquish, vacate, or discard. The word abandon denotes the absolute giving up of an object, often without further implication of its surrender to the mercy of something or someone else."

Carrington vs. Crandell, 65 Idaho 525, 147 P.2d 1009 (1944) This definition

clearly sets out the concept by which the activities of the appellants should be measured. The failure of the evidence to establish any manifest intention on behalf of the appellants necessitates a reversal of the District Court's decision as a matter of law.

#### CONCLUSION

For the reasons stated above, the appellants respectfully pray that this court reverse the Judgment of the District Court and enter Judgment in favor of the appellants as a matter of law, or failing that, granting appellants' motion for a new trial.

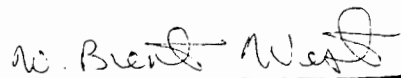
DATED this 17<sup>th</sup> day of March, 1977.

Respectfully submitted,

W. BRENT WEST &  
DARRELL G. RENSTROM  
Attorney for Defendants--Appellants

#### CERTIFICATE OF MAILING

We, W. Brent West and Darrell G. Renstrom, attorneys for Defendants--Appellants, hereby certify that we mailed a true and correct copy of the above and foregoing Brief of Appellants to Richard Campbell, Attorney for Plaintiff--Respondent, at 2630 Washington Blvd., Ogden, Utah 84401, this 17th day of March, 1977.

  
\_\_\_\_\_  
W. BRENT WEST

  
\_\_\_\_\_  
DARRELL G. RENSTROM